

Weisbach v Board of Town Trustees Town of Southold

2024 NY Slip Op 34813(U)

September 9, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 622971-23

Judge: Marian Rose Tinari

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Index No. 622971-23

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 53 - SUFFOLK COUNTY

PRESENT:

Hon. MARIAN ROSE TINARI
Justice of the Supreme Court

MOTION DATE 09-13-23
ADJ. DATE 01-15-24
Mot. Seq. # 001 – Continued
002 – MotD

ANDREW WEISBACH and ANDREA
WEISBACH,

Petitioners

- against -

BOARD OF TOWN TRUSTEES TOWN OF
SOUTHOLD,

Respondents.
_____X

WILLIAM D. MOORE, ESQ.
Attorney for Petitioner
51020 Main Road
Southold, New York 11971

SCOTT KREPPEIN, ESQ.
DEVITT SPELLMAN BARRETT, LLP
Attorney for Respondents
50 Route 111, Ste 314
Smithtown, New York 11787

Upon the following papers number 1 to 39 read on this motion to dismiss; Notice of Motion and supporting papers 1-118; Answering Affidavits and supporting papers 1-11; Replying Affidavits and supporting papers 1-91; it is hereby decided.

Petitioners, Andrea and Andrew Weisbach (“petitioners”), are owners of real property located at 497 Ripplewater Lane, Southold, New York. The Board of Town Trustees Town of Southold (“Board” or “respondent”) respondent, is a municipal corporation under the laws of New York State, vested with authority over the tidal and freshwater wetlands in the Town of Southold (“Town”), as well as ownership of certain underwater lands.

On May 17, 2023, the Board, after a hearing, adopted a resolution with respect to petitioners’ request to extend a dock structure on their property. Petitioners now move pursuant to CPLR 7803(1), (2) and (3) to reverse and annul the Board’s determination and for a judgment that respondents violated their riparian rights. Respondents seek an order denying the Article 78 petition and dismissing the action.

The following is a brief chronology of events which led to this application.

After purchasing their home in 2021, petitioners requested transfer of a Wetland permit, issued to the previous owner in 2005, to them. By letter dated April 20, 2023, the Board denied the permit transfer after a field inspection revealed that an existing dock on the property was not in compliance with the original permit allowing, among other things, construction of a 4' by 65' walkway with steps to grade.

The Board also considered an application by petitioners for a Wetland permit to remove existing violations on the property and to make certain improvements. Specifically, petitioners sought to remove floating docks and construct a 4' x 48' fixed pier extension supported by 8' diameter chromated copper arsenate pilings using "ThruFlow" decking. The plan included relocation of an aluminum ramp from the current dock to the pier extension. The proposed extension led to a long fixed "T" section at the end of a catwalk affixed with an aluminum ladder. However, after consulting the New York State Department of Environmental Conservation ("DEC"), petitioners amended the plan to shorten the proposed extension to 4' x 24'. A DEC permit was issued for the revised plan. A DEC permit is required for the issuance of a Wetland permit from the Town (Town of Southold Code §275-6[11]). Petitioners submitted the revised proposal to the Board, which it received on May 11, 2023.

Prior to the receipt of the revised proposal, a field inspection was conducted by Trustee Elizabeth Peeples ("Peeples"), on May 9, 2023, and four other Trustees. Peeples noted in the field inspection report that "water depths [be provided] . . ." and suggested a "proposed configuration of similar length of existing but in fixed dock format . . ." as well as "remov[al] [of] floats, remov[al] [of] lighting on dock, remov[al] [of] lighting on access path, remov[al] [of] irrigation on access path . . ."

By memorandum dated May 16, 2023, the Local Waterfront Revitalization Program ("LWRP") also reviewed petitioners' application for a Wetland permit and recommended against granting it stating that the proposed extension to the dock was "not suitable . . . due to the limiting water depth . . ." The LWRP also noted the "[previous] denial of the prior owner's application and that the subject waterway, Goose Creek, is a Critical Environmental Area 'nominated' by the Town as worthy of protection . . ."

The Conservation Advisory Committee ("CAC") also reviewed petitioners' application. However, a review of the record reveals the CAC did not review petitioners' revised plans which were received by the Board on May 11, 2023. The CAC issued its recommendation on May 10, 2023. Moreover, it appears the CAC considered a "4' x 48' pier extension" rather than the "4' x 24'" extension contained in the revised plan. Significantly, the CAC resolved not to support the application because of the "excessive extension into the creek."

On May 17, 2023, the Board held a public hearing regarding petitioners' application. Jeff Patanjo, Esq. ("Patanjo") appeared on behalf of petitioners. After reading petitioners' application into the record, the Board read the notes from the May 9, 2023 field visit, including the directive to "provide water depths." The Board also noted that the LWRP and CAC resolved not to support the application and that a similar application to extend the dock by a previous owner was denied in 2009 due to the "limited water depth in this location."

After opening the floor to public comments, Patanjo advised the Board that the proposal met Town Code and DEC projection requirements. Patanjo acknowledged the existing violations and advised that petitioners were working to correct those deficiencies and understood a permit would not be released until the violations were resolved. Patanjo also noted that although the water depth at the edge of the dock is currently too shallow for docking, the proposed extension would provide an additional six inches of water depth. The Board “approved” the motion only for the 4’ by 16’ “T” configuration at the end of the 4’ x 65’ dock contingent on remediation of current violations. No reasoning was provided as to the extension denial until Patanjo asked for clarification. A Trustee responded by stating “[A]nd my motion will bring it into consistency with the LWRP.” At the conclusion of the discussion among the Trustees, Patanjo stated “I have no idea what you want me to do. I’ll call you tomorrow.”

Petitioners thereafter commenced this hybrid CPLR article 78 petition alleging, *inter alia*, that the Board lacked a rational basis for its determination and thus improperly denied their application for a Wetland permit to extend their dock 24’ into Goose Creek. Petitioners contend the Board’s determination was arbitrary and capricious because it failed to state an explanation for the denial of the proposed dock extension.

“In a CPLR article 78 proceeding, the [c]ourt’s review is limited to the arguments and record adduced before the agency” (*Matter of Kahn v Planning Bd. of City of Buffalo*, 60 AD3d 1451 [4th Dept 2009] leave denied 13 NY3d 711, internal quotations omitted; see also *Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]). While the Court notes the additional arguments put forth in the context of this application, those contentions are not considered herein as they were not proffered until this proceeding commenced.

Respondents move to deny the Article 78 petition and dismiss cause of action pursuant to CPLR 3211(a)(7). A CPLR Article 78 proceeding is a special proceeding giving the Court the ability to decide “upon the pleadings, papers, and admissions to the extent that no triable issues of facts are raised” (*Battaglia v Schuler*, 60 AD2d 759, 759-760 [4th Dept 1977]; CPLR 409[b]). Furthermore “where . . . ‘it is clear that no dispute as to the facts exists and no prejudice will result,’ [a] court can, upon a motion to dismiss, decide the petition on the merits” (*Matter of Arash Real Estate & Mgt. Co. v NY City Dept. of Consumer Affairs*, 148 AD3d 1137, 1138 [2d Dept 2017]).

However, when a Board does not adequately explain its decision, judicial review is stymied. “Findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination” (*Perrella v Suffolk County Classification & Salary Appeals Bd.*, 117 AD2d 603, 604-605 [2d Dept 1986]); see also *Rumseyfall LLC v Porcelli*, 80 Misc 3d 1209[A], 2023 NY Slip Op 50945[U] [Sup Ct, Seneca County 2023]; see also *Montauk Improv., Inc. v Proccacino*, 41 NY2d 913, 914 [1977]). Here, the Board failed to explain its decision, thus precluding review on the merits. With respect to adopting a resolution, Town of Southold Code §275-8(E) informs that:

After the public hearing on such applications, the Trustees shall either adopt a resolution directing the issuance of a permit or adopt a resolution denying the application. A resolution directing the issuance of a permit may be adopted only if the Trustees find that the proposed operations will conform to the standards set forth in § 275-11 hereof. *If the*

Trustees adopt a resolution denying an application for a permit, the reasons for such denial shall be set forth in the resolution. (emphasis added).

Respondent contends the Board did not deny petitioners' application, but rather "approved it with conditions." Ultimately, however, while the Board "approved" the "motion," it denied petitioners' application for the dock extension sought. The record reflects the extension was the crux of petitioners' request because it was intended to provide dock access at low tide, as noted by Patanjo. Therefore, in accordance with the Town Code, the Board was required to set forth its reasons for denial and failed to do so.

The Board's failure to articulate its reasoning precludes judicial review as to whether there was a rational basis for the decision. When Patanjo sought clarification on the determination, a Board member stated the "motion will bring [the application] into consistency with the LWRP." In *Rumseyfall LLC v. Porcelli* the Town Code explicitly established the criteria to be considered in the issuance of the Zoning Board Agency's decision. However, the Zoning Board failed to enumerate any findings in support of its determination. The reviewing court found that "the failure [of the ZBA] to make findings or state the basis for its decision in relation to the criteria set forth in Town Code requires annulment of the ZBA's determination and remand to the ZBA to make the required findings" (*Rumseyfall LLC v Porcelli*, 80 Misc 3d 1209[A], 2023 NY Slip Op 50945[U] [Sup Ct, Seneca County 2023]; see also *Paloma Homes, Inc. v Petrone*, 10 AD3d 612 [2d Dept 2004]).

In *Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. of the Town of Sand Lake*, 206 AD3d 1507, 1510 [3d Dept 2022], a planning board's decision to grant a special use permit was upheld as reasonable when challenged under CPLR 7803(3) because the resolution reflected that the board considered the relevant criteria from the Town Code. Furthermore, in its resolution, the Board noted that the basis for its determination was justified under the Town Code and set forth the evidence it relied upon (see *Matter of Perry v Patricia A. Brennan Qualified Personal Residence Trust*, 153 AD3d 522 [2d Dept 2017] upholding a board's decision to deny a dredging permit as reasonable when the Board clearly considered criteria from the Town Code). Here, the Board did not reference any criteria from relevant provisions of the Town Code which factored into its decision, nor any evidence relied upon.

Even assuming the Board's reference to the LWRP indicates its decision was a result of environmental concerns, it is worth noting that the Board did not distinguish the fact that the DEC issued a permit to petitioners, since the two agencies have "parallel environmental concerns" (*Savino v Bd. of Trustees of the Town of Southold*, 2015 NY Slip Op 30813[U], *2 [Sup Ct, Suffolk County 2015]). In *Savino* the Court annulled a determination made by the Board in its denial of a permit to repair and replace an existing bulkhead. While the Board stated its decision was due to environmental considerations, the Court found that ". . . while not dispositive . . . there was an insufficient explanation for why the DEC issued a wetland permit for the proposed project, and the Trustees denied a permit" (*Savino v Bd. of Trustees of the Town of Southold*, at 2). Here, too, the Board failed to explain the reason its ruling ran counter to the DEC.

Regarding the CAC's review, the Town of Southold Code 275-8 states:

Upon receipt of the application, the office of the Trustees shall maintain the original in the file and forward one copy thereof to each of the following as necessary: the Conservation Advisory Council, the LWRP Coordinator, the Stormwater Management Officer, the Planning Department, and the Zoning Board. *The Conservation Advisory Council shall review said application* and the effect, if any, on the wetlands and tidal waters of the Town that may result from the proposed operations and shall, within 20 days of receipt of the same, forward its written report of findings and recommendations with respect to such application to the Trustees. If the Conservation Advisory Council shall recommend that such application be disapproved, the reasons for such disapproval shall be set forth in such report. If no response is received within 20 days, the review by the Conservation Advisory Council shall be deemed waived (emphasis added).

“While a regulatory agency is entitled to rely on all facts that exist so long as they are reliable and trustworthy, a rule must be annulled when the information on which the agency relied is proven to be outdated, erroneous or incomplete” (*Relay Delivery, Inc. v NY City Dept. of Consumer & Worker Protection*, 2023 NY Slip Op 33351[U], *8 [Sup Ct, NY County 2023]) The CAC did not review the application considered by the Board on May 17, 2023. Yet the Board read the CAC's recommendation against adoption into the record. Since the CAC's recommendation is a required aspect of the review, the record was not complete. Hence, since the Board relied on a recommendation that was “outdated, erroneous or incomplete,” the Board's determination should be annulled.

Since the Board did not provide an explanation as to its May 17, 2023 determination of petitioners' application and because the Board may have relied on “outdated, erroneous or incomplete” information to make a ruling, its determination is annulled. Furthermore, this matter shall be remitted to the Board for reconsideration of the application in accordance with the relevant provisions of the Town Code as set forth herein.

Respondent's application is denied in its entirety.

ORDERED that the petition is granted insofar The Board of Town Trustees Town of Southold's May 17, 2023, decision is hereby annulled and remitted to the Board for reconsideration of the application in accordance with the relevant provisions of the Town Code as set forth herein.

Dated: September 9, 2024

MARIAN ROSE TINARI, J.S.C

GRANTED

SEP 09 2024

VINCENT PULEO
Clerk of Suffolk County

FINAL DISPOSITION NON-FINAL DISPOSITION